Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1971

No. 71-1334

TWENTIETH CENTURY-FOX FILM CORPORATION,

Petitioner.

vs.

VICTOR DESNY,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three.

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IN THE

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TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioner,

vs.

VICTOR DESNY,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three.

The petitioner Twentieth Century-Fox Film Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, entered in this proceeding January 20, 1972.

Opinion Below.

The opinion of the Court of Appeal, which by order of that Court will not be published,[1] appears in Appendix A hereto.

[1]The order was pursuant to California Rules of Court 976(c): "Every opinion of a Court of Appeal shall be deemed to meet the standard for publication specified in subdivision (b) and shall be published in the Official Reports unless (1) a majority of the court rendering the opinion certifies that it does not meet the standard for publication and specifies it for nonpublication and

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Jurisdiction.

The judgment of the Court of Appeal was entered January 20, 1972. Thereafter petitioner petitioned to the California Supreme Court for a hearing and such petition was denied without opinion. This petition for certiorari is filed within 90 days of the entry of the judgment of the Court of Appeal. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

Question Presented.

Does this Court's holding in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) invalidate California's doctrine that an enforceable *implied* contract to pay for using uncopyrightable story ideas may be found to have arisen from the unsolicited submission of such ideas, no matter how common? As to the parameters of the California rule, see *Desny v. Wilder*, 46 Cal.2d 715, 299 P.2d 257 (1956).

Three years ago this Court posed a closely related question to the Supreme Court of California when it remanded *Lear, Inc. v. Adkins*.[2] That litigation was resolved without further proceedings in the California Courts, however, and the California Supreme Court has since refused to consider cases, including this case, which pose the question. Nor has the question been answered elsewhere.[3]

Constitutional Provisions and Statutes.

United States Constitution, Article I, Section 8, Clause 8, and The Copyright Law, 17 U.S.C. §1 *et seq.*

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(2) either no petition for hearing in the Supreme Court is filed in the cause or the petition is denied by the Supreme Court without ordering publication of the Court of Appeal opinion."

[2]395 U.S. 653, 674-5 (1969).

[3]See below at Footnotes 17 and 18.

Statement of the Case.

In September 1958, respondent Victor Desny, without having been requested or invited to do so, submitted a story outline entitled "Three Decker Widow" to a motion picture director under contract to Petitioner Twentieth Century-Fox Film Corporation ("Fox") by putting the same in an envelope addressed to the director and leaving it with a secretary in Fox's Story Department. Desny had no discussions whatsoever with any representative of Fox concerning his story. Subsequently, the material was rejected by the director whose sister mailed it back to Desny.

On September 30, 1964, Desny sued Fox for $500,000 damages in the Superior Court of the State of California for the County of Los Angeles claiming that his story ideas had been wrongfully used in a motion picture called "What A Way To Go" which Fox had financed and was distributing. Desny's legal contention was that Fox had breached an implied agreement to pay for the use of "his" ideas which had arisen out of his unsolicited submission.[4] Fox denied the allegations and asserted the parties' works were dissimilar as a matter of law and the motion picture had been conceived and produced independently of, and without reference to, Desny's work.

The case was tried in July 1969, and after having been instructed that it could find an enforceable agreement between Desny and Fox concerning the use of the submitted ideas,[5] the jury returned a verdict of $50,000. Fox moved for a new Trial and Judgment N.O.V.

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[4]Other causes of action were alleged in the complaint, but the case went to the jury on the implied contract count only.

[5]*E.g.*, Jury Instruction: "In order for the creator of an abstract idea to recover compensation for such an idea, he must prove by

(This footnote is continued on next page)

The motion for new trial was granted on the grounds of insufficiency of evidence and that the verdict was against the law. Fox's motion for judgment notwithstanding the verdict was denied. The Superior Court's order ruling on said motions appears below as Appendix B.

Thereafter, both parties appealed to the California Court of Appeal, Second Appellate District, which affirmed both the order granting the new trial and the order denying judgment N.O.V. by decision entered January 20, 1972.[6] The parties' subsequent petitions to the California Supreme Court for hearing were denied March 16, 1972.

The question sought to be reviewed was not raised at trial—which commenced within five weeks of this Court's decision in *Lear, Inc. v. Adkins*—but was raised by Fox in all its briefs and argument in the Court of Appeal and in its Petition for hearing to the California Supreme Court.

The Court of Appeal dealt with the question in a cursory fashion (Appendix A, pp. 14-16), and its answer, which Fox contends is untenable, must be deemed to be California's answer to the question this Cout posed in *Lear, Inc. v. Adkins.*

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a preponderance of evidence either . . . or the circumstances preceding or attending the disclosure together with the conduct of the party to whom it was disclosed acting with knowledge of the circumstances show a promise of the type that will constitute an implied contract." [Clk. Tr. p. 74.]

[6]The Court of Appeals first decided the case November 9, 1971. Fox petitioned for rehearing on the primary ground the court had purported to rule on the question of similarity without viewing the accused motion picture. The Court granted the petition, vacated the decision, viewed the motion picture and on January 1972 issued a virtually identical opinion and decision.

By Refusing to Bring California Law Into Conformity With Lear, Inc. v. Adkins the California Courts Have Incorrectly Decided a Federal Question of Substance.

> "On the one hand, the law of contracts forbids a purchaser to repudiate his promises simply because he later becomes dissatisifed with the bargain he made. On the other hand, federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent." *Lear, Inc. v. Adkins.*[7]

California law has long permitted the implication of a contract from the unsolicited submission of uncopyrightable "story ideas" to persons and entities in the entertainment business.[8] California's implied contract has been said to be an express contract proved by circumstantial evidence[9] rather than one implied-in-law[10]

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[7]395 U.S. 653 (1969).

[8]*Desny v. Wilder*, 46 Cal. 2d 715, 299 P. 2d 257 (1956); *Chandler v. Roach*, 156 Cal.App.2d 435, 319 P.2d 776 (1957); *Heckenkamp v. ZIV Television Programs*, 157 Cal.App.2d 293, 321 P.2d 137 (1958); *Teich v. General Mills, Inc.*, 170 Cal.App. 2d 791, 339 P.2d 627 (1959); *Jacobs v. Medford*, 210 Cal.App. 2d 164, 26 Cal.Rptr. 591 (1962); *Davies v. Krasna*, 245 Cal. App.2d 535, 54 Cal. Rptr. 37 (1966); *Donahue v. ZIV Television Programs, Inc.*, 245 Cal.App.2d 593, 54 Cal.Rptr. 130 (1966); *Ware v. Columbia Broadcasting Systems, Inc.*, 253 Cal. App.2d 489, 61 Cal.Rptr. 590 (1967); *Henried v. Four Star Television*, 266 Cal.App.2d 435, 72 Cal.Rptr. 223 (1968); *Minniear v. Tors*, 266 Cal.App.2d 495, 72 Cal.Rptr. 287 (1968); *Donahue v. United Artists Corp.*, 2 Cal.App.3d 794, 83 Cal.Rptr. 131 (1969); *Blaustein v. Burton*, 9 Cal.App.3d 161, 88 Cal. Rptr. 319 (1970); *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal.App.3d 996, 88 Cal.Rptr. 679 (1970); *Davis v. Krasna*, 12 Cal.App.3d 1049, 91 Cal.Rptr. 250 (1970), *cert. denied*, 403 U.S. 931 (1971).

[9]*Desny v. Wilder*, 46 Cal.2d 715, 734-40, 299 P.2d 257 (1956).

[10]*Weitzenkorn v. Lesser*, 40 Cal.2d 778, 794-95, 256 P.2d 947 (1953).

but the cases demonstrate[11] that the characterization is for all practical purposes inconsequential.[12] Unlike the law of other states[13] California law permits an implied contract to arise from the submission of banal (as opposed to "novel") ideas which have not been cast in concrete form.

The "implied submission contract" in California is now so fictitious that it is a contract in name only, and any access to uncopyrighted material—no matter how banal—which can be traced to a submission by or in behalf of the plaintiff may permissibly be found by a jury to have given rise to a "contract".[14]

By its decisions in *Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225 (1964), *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) and *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), this Court signalled a fundamental change in the law of ideas by emphasizing the primacy of the principle that ideas not protected by patent or copyright are available to all.[15]

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[11]See cases cited note 8 *supra*.

[12]Compare the law of New York which makes meaningful distinction between contracts implied from actual conduct and unjust enrichment in this area. *Downey v. General Foods Corporation*, 37 App. Div. 2d 250, 323 N.Y.S.2d 578 (1971).

[13]*See, e.g., Epstein v. Dennison Mfg. Co.*, 314 F.Supp. 116, 126 (S.D.N.Y. 1969); *Stevens v. Continental Can Co.*, 308 F.2d 100 (6th Cir. 1962), *Cert denied*, 374 U.S. 810, (1963); *Puente v. President and Fellows of Harvard College*, 149 F.Supp. 33 (D. Mass.), *aff'd* 248 F.2d 799 (1st Cir. 1957), *cert. denied*, 356 U.S. 947 (1958).

[14]*E.g., Rickard v. Patterson and American Broadcasting Co.*, Los Angeles Superior Court No. 845339. Rickard's unsolicited submission—which was merely a "let's do-a-vaudeville-show"—was left with the secretary of a minor local programming executive. Years later ABC-TV produced a vaudeville show called "Hollywood Palace" and Rickard sued for $500,000. The case was permitted to go to trial and preoccupied the judge and jury for approximately two and a half weeks.

[15]See also, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

While *Lear, Inc. v. Adkins*, speaks of contracts restricting use of ideational matter utilized in industry and customarily protected, if at all, by patent, it is equally authoritative in the area of contracts purporting to restrict the use of ideational matter utilized in literature, entertainment and communication and customarily protected, if at all, by copyright; for this Court has clearly chosen to treat the two sorts of ideational matter, which are covered by the same clause in The Constitution (Art. I, §8, Cl.8), on a par.[16]

Nevertheless, practically all the cases elucidating the non-estoppel aspects of *Lear, Inc. v. Adkins* have concerned inventions and/or trade secrets.[17]

In *Lear, Inc. v. Adkins* the Court invalidated an intentional, written contract requiring payments for the use of inventive but unpatentable ideas.

Petitioner contends that a rule of law which permits a jury to find an implied contract requiring payment for the use of common uncopyrightable ideas

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[16]*Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Lear, Inc. v. Adkins*, 395 U.S. 653, 668 (1969); *Graham v. John Deere Co.*, 383 U.S. 1 (1966); *Mazer v. Stein*, 347 U.S. 201 (1954). *See*, dissent of Mr. Justice Douglas upon denial of certiorari in *Lee v. Runge*, ... U.S. ...., 92 S. Ct. 197, 30 L. Ed.2d 169 (1971); *Sinatra v. Goodyear Tire and Rubber Co.*, 435 F.2d 711 (9th Cir. 1970); *CBS, Inc. v. De Costa*, 377 F.2d 315 (1st Cir., *cert. denied*, 389 U.S. 1007 (1967); *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir., 1964), *cert. denied sub. nom., KLIX Corp. v. Cable Vision, Inc.*, 379 U.S. (1965).

[17]*E.g. Massillon-Cleveland-Akron Sign Co. v. Golden State Advertising Co.*, 444 F.2d 425 (9th Cir.) *cert. denied*, 30 L.Ed. 2d 117 (1971); *Painton & Company, Ltd. v. Bourns, Inc.*, 442 F.2d 216 (2d Cir. 1971); *DeKar Industries Inc. v. Bissett-Berman Corp.*, 434 F.2d 1304 Cir. 1970); *Joseph Bancroft & Sons, Co. v. M. Lowenstein* (9th Cir. 1970) *cert. denied* 402 U.S. 945 (1971); *Joseph Bancroft & Sons. Co. v. M. Lowenstein & Sons, Inc.*, 50 F.R.D. 415 (D. Del. 1970).

where there have been no writings, words, meaningful conduct, or mutual intent is *a fortiorari* invalid.

The California Courts—in which a large percentage of the literary property-entertainment litigation now takes place—have failed and refused to acknowledge either the implications or the supremacy of *Sears, Compco,* and *Lear* in the implied submission agreement context.[18] Until this Court holds otherwise, they will continue to permit persons such as respondent herein to stake claims to portions of the public domain and compel publishers, broadcasters, and entertainment producers to pay tribute for using the commonest of ideas.

Conclusion.

For the foregoing reasons this Petition for Certiorari should be granted.

April 14, 1972.

Respectfully submitted,

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[18]In addition to the unpublished opinion in the instant case, the Court of Appeal has avoided the *Lear* question in *Davies v. Krasna,* 12 Cal.App.3d 1049, 91 Cal. Rptr. 250 (1970) *cert. denied,* 403 U.S. 931 (1971); *Fink v. Goodson-Todman Enterprises, Ltd.,* 9 Cal.App.3d 996, 88 Cal.Rptr. 679 (1970); *Donahue v. United Artists Corp.,* 2 Cal.App.3d 794, 83 Cal. Rptr. 131 (1969). The California Supreme Court denied petitions for hearing in *all* of these cases.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Victor Desny, Plaintiff, Appellant and Cross-Respondent, vs. Twentieth Century-Fox Film Corporation, Defendant, Respondent and Cross-Appellant. 2 Civil No. 35924, (Superior Ct. No. 846594).

Filed: January 20, 1972.

APPEAL from order of the Superior Court of Los Angeles County granting defendant's motion for a new trial and cross-appeal from order denying defendant's motion for judgment notwithstanding the verdict. Elisabeth E. Zeigler, Judge. Each order affirmed.

Ludwig H. Gerber for Appellant and Cross-Respondent.

Lillick, McHose, Wheat, Adams & Charles, Anthony Liebig and Michael E. Meyer for Respondent and Cross-Appellant.

After a jury had awarded plaintiff Desny a verdict in the sum of $50,000 against defendant Twentieth Century-Fox Film Corporation (hereinafter designated as Fox), the trial court denied defendant's motion for judgment notwithstanding the verdict and granted its motion for a new trial. Plaintiff appealed from the order granting a new trial. Defendant appealed from the order denying its motion for judgment notwithstanding the verdict.

Plaintiff contends on this appeal that the proceedings with respect to the motion for a new trial were legally ineffective. That contention was considered, however, by another division of this court in a pro-

ceeding in prohibition (*Desny v. Superior Court,* 2d Civ. No. 36048) and determined to be untenable, the written opinion of the court being unpublished. That determination is final and plaintiff is bound thereby (*Overstreet v. County of Butte,* 57 Cal.2d 504, 506.)

On December 9, 1970, another division of this court denied without prejudice the motion of plaintiff Desny to dismiss the cross-appeal of defendant Fox on the ground that the notice of cross-appeal was not timely filed. The superior court file has been transmitted to this court upon request. (Rule 12(a), Cal. Rules of Court.) That file discloses that the judgment on the verdict was entered on August 4, 1969. On August 29, 1969, defendant Fox's motion for judgment notwithstanding the verdict was denied and its motion for a new trial was granted. On October 7, 1969, plaintiff Desny filed a notice of motion to vacate the order granting a new trial on the ground that the court had acted without jurisdiction. On October 24, 1969, plaintiff Desny filed a notice of appeal from the order of August 29, 1969, "purportedly granting Defendant herein a new trial in the within action." The motion of plaintiff Desny for an order vacating and setting aside the order for a new trial was heard and submitted on November 3, 1969, and was denied on November 26, 1969. On December 8, 1969, defendant Fox filed a notice of cross-appeal from the order denying its motion for judgment notwithstanding the verdict, being the notice which plaintiff Desny claims to have been untimely filed.

At the times herein pertinent, subdivision (a) of rule 3 of California Rules of Court provided that if the motion for a new trial is "granted and an appeal is taken from the order granting it, the respondent,

within 20 days after mailing of notification by the clerk of such appeal, may file notice of appeal from the judgment, and on that appeal may present any question which he might have presented on an appeal from the judgment had the motion for new trial been denied." However, the primary question presented by plaintiff Desny's contention is the applicability of subdivision (b) of rule 3. In considering that question it is to be noted that subdivision (g) of rule 40 of California Rules of Court provides as follows: "'Judgment' includes any judgment, order or decree from which an appeal lies." An appeal lies from an order denying a motion for judgment notwithstanding the verdict. (Code Civ. Proc., § 904.1, subd. (d).)

At the times pertinent herein, subdivision (b) of rule 3 was as follows: "When a valid notice of intention to move to vacate a judgment or to vacate a judgment and enter another and different judgment is served and filed by any party on any ground within the time in which, under rule 2, a notice of appeal may be filed, or such shorter time as may be prescribed by statute, (1) if the motion is denied or not decided by the superior court within 150 days after entry of the judgment, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after entry of the order denying the motion to vacate or 180 days after entry of the judgment, whichever shall be less; . . ."

In the present case the notice of the motion to vacate the order for a new trial must be deemed to have been a valid notice inasmuch as the ground specified was that the court had acted without jurisdiction (see *Estate of Poper*, 274 Cal.App.2d 786, 790), although, as determined by another division of this court in *Des-*

ny v. Superior Court, 2d Cir. No. 36048, jurisdiction did in fact exist. In short, the motion to vacate was based upon a ground which entitled plaintiff Desny to a hearing. It is true that on October 24, 1969, plaintiff Desny did file a notice of appeal from the order "purportedly" granting defendant Fox a new trial, but at that time plaintiff Desny's motion to vacate the order for a new trial was pending and undetermined. The reasonable conclusion is that under such circumstances the quoted provisions of subdivision (b) of rule 3 of California Rules of Court had been brought into effect prior to plaintiff Desny's notice of appeal of October 24, 1969. Consequently, defendant Fox's notice of appeal from the order denying its motion for judgment notwithstanding the verdict was legally effective since it was filed 12 days after the entry of the order denying the motion to vacate. (See *Duncan v. Sunset Agricultural Minerals*, 273 Cal.App.2d 489, 491-492; *Garcia v. City etc. of San Francisco*, 250 Cal.App.2d 767, 770; *Johnson v. Goodyear Tire & Rubber Co.*, 216 Cal.App.2d 133, 135-136.)

While the complaint embodied two causes of action, at the trial plaintiff rested on the second cause of action. Portions of the complaint as to that cause of action were as follows: 1. "Prior to the year 1958, plaintiff conceived, created, originated and wrote an original literary composition entitled 'THE THREE DECKER WIDOW' (hereinafter referred to as 'Plaintiff's composition'), a copy of which is attached hereto, marked Exhibit A and incorporated herein by this reference." 2. In or about November of 1958, plaintiff submitted his composition to defendant Fox "upon the implied understanding and agreement that in the event said defendant thereafter used plaintiff's said composi-

tion in whole or in part that said defendant would pay to plaintiff the reasonable value thereof, . . ."[1] 3. "Contrary to the terms and provisions of said implied understanding and agreement, at a time or at times unknown to plaintiff but prior to May, 1964, plaintiff is informed and believes and thereupon alleges that defendant Fox used and copied from plaintiff's composition 'THE THREE DECKER WIDOW' in the production of a motion picture photoplay entitled 'WHAT A WAY TO GO' and that commencing on or about May 25, 1964 and thereafter it and including the date hereof, defendant Fox caused said photoplay to be released, distributed and exhibited theatrically and otherwise throughout the United States of America . . . and elsewhere throughout the world without payment of any kind or nature whatsoever to plaintiff; . . ."

The plaintiff testified that in November of 1958 he personally went to the story department at the Fox studio and gave his composition to Virginia Denman, telling her to "please see" that Edmund Goulding received the story. Three or four days before that occurrence, plaintiff had talked on the telephone to Mrs.

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[1]In *Desny v. Wilder*, 46 Cal.2d 715, at page 739, the Supreme Court stated: ". . . .if the idea purveyor has clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used by the offeree and offeree, knowing the condition before he knows the idea, voluntarily accepts its disclosure (necessarily on the specified basis) and finds it valuable and uses it, the law will either apply the objective test . . . and hold that the parties have made an express (sometimes called implied-in-fact) contract, or under those circumstances, as some writers view it, the law itself, to prevent fraud and unjust enrichment, will imply a promise to compensate. [¶] Such inferred or implied promise, if it is to be found at all, must be based on circumstances which were known to the producer at and preceding the time of disclosure of the idea to him and he must voluntarily accept the disclosure, knowing the conditions on which it is tendered."

Procter, Mr. Goulding's sister. Mrs. Procter told him that her brother would like to read his script and directed him to send or deliver it to the Fox story department "in care" of her brother. Mr. Goulding was a director at Fox and plaintiff had worked as an actor in three of his pictures. He had known Mr. Goulding since 1955 or 1956. About three weeks after he left his composition at the Fox studio, he called Mrs. Procter. She told him that her brother could not use it at that time and that she was going to mail it back to him. In January of 1959 he received a letter from Mrs. Procter, together with his script.

Mrs. Procter testified that Edmund Goulding died in December of 1959.

A summary of plaintiff's composition, "The Three Decker Widow," which was about 19 pages in length, will be given. Corina, "an attractive woman of American parentage, who had fled the Communist regime in China," comes to San Francisco because she has learned that men are not outnumbered by women there and, consequently, the chances of matrimony would be fair. She is thirty-nine years old. She marries Mr. Lothar, a seventy-three year old man, who occupies the first floor of a "three-story, mortgage-free house in the fashionable Nob Hill district." The second floor is occupied by a widower in his early fifties, Dr. Fink, a prominent surgeon. In the top floor apartment lives a thirty-six year old bachelor, Marcel, "a hopeful mural painter," who is several months delinquent in the payment of his rent.

Mr. Lothar attempts sexual activity with Corina and suffers a heart attack. Dr. Fink renders him medical treatment. Mr. Lothar dies several days later. After some months of mourning, Corina marries Dr. Fink.

locking the first-floor apartment and moving into that on the second floor. About seven months later, Dr. Fink dies at a clinic where he had gone to perform a complicated operation.

Marcel is attracted to Corina but avoids her because he is "scared it might soon be his turn to join her two previous husbands." Although several gentlemen had inquired about renting the first-floor apartment, "because of the generous inheritance from her two late husbands, Corina could well afford the luxury of keeping it unoccupied."

About a year after Dr. Fink's death, Marcel accepts Corina's New Year's Eve invitation. They decide to marry. The second-floor apartment is closed and she moves into the apartment of her new husband. The "inherited fortunes" cause her to nourish a secret doubt which she expresses to Marcel one day in asking him if he married her "for love only." She also asks him if he is not afraid "of this strange fatality which seems to pursue" her and "the ones" she loves. He replies, "No. Because the house is only three stories high and this is the last story. If you climb any higher you will go straight to heaven."

After a nightmare, Marcel decides that the sooner he leaves the house the better. "He is convinced that if he could avoid this three-story Hoodoo house he could then escape the fate of Corina's former husbands."

Corina and Marcel drive along the California coast in their luxurious car. A storm forces them to take refuge in "a brand new solar house built on the edge of a cliff overlooking the ocean." The cottage is built on a swivel which is caused to revolve in any desired di-

rection by the pushing of a button. Corina desires to turn the house. The house begins to revolve slowly and then suddenly stops with a jerk. The mechanical device breaks down completely. The house "falls prey to the storm." Marcel makes a hole in the door. A more violent gust hits the house and Marcel goes completely through the hole and disappears. But apparently Marcel is "too difficult a subject even for the widow's bewitching 'charms' " and the "sudden jerk of the house threw him clear . . . of the cliff onto the sand where he lay stunned."

Later, in a clinic, Corina is by Marcel's bedside. "Marcel reaches up, contentedly, his fears allayed, draws Corina's face down to his own. He smiles. 'Pish the Hoodoo. If I have lived through this hell, your Chinaman's prophecy was meant for me, too. I want to stay under your spell like this—forever.' And he pressed his lips hard on hers."

The screenplay for the Fox picture entitled "What a Way to Go" was written by Betty Comden and Adolph Green. This court has viewed the motion picture. The main character is a beautiful young woman named Louisa who is interested in marriage for love and disdains the accumulation of wealth. But each of her marriages, except the last, is untimely terminated by the death of her husband from whom she inherits a substantial fortune. Her first husband is chosen by her in preference to a rich young man because he is not interested in material gain but, rather, in a relaxed and unpretentious manner of life. However, his attitude changes after the marriage and he amasses a fortune. Following his unexpected death Louise goes to Paris. A poor mural painter, who later gains fame because of his pictures painted by means of a machine.

becomes her second husband. After a chance suggestion by Louisa he accumulates great wealth because of his paintings, but he is accidentally killed by the machine. The third husband is already wealthy but, although he personally neglects his business affairs in the course of a very pleasant marriage, his fortune greatly increases, a fact which causes him personal distress and leads to Louisa's suggestion that they retire to a farm and live a quiet life. They move to a farm, but he is accidentally killed by a bull. Thereafter, by chance Louisa meets an entertainer who, following a suggestion by Louisa as to a change in his stage appearance, achieves great fame as a star and is crushed to death by a mob of admirers.

After an unsuccessful attempt to present to the United States Government a check for many millions of dollars, Louisa consults a psychiatrist. Her conversation reveals that she believes that she has carried some curse with her—a witch's curse—which led to the death of her husbands. Louisa declines the psychiatrist's proposal of marriage. The door of the psychiatrist's office is opened by the janitor. He is the person who had been the rich young man that had been rejected by Louisa in favor of her first husband. Louisa marries the janitor and they achieve happiness, raising their children in an unpretentious rural setting.

It should be further noted that at one point in Louisa's consultation with the psychiatrist, he faints and, regaining consciousness, finds himself on his office couch. As depicted in the motion picture, the psychiatrist's couch is of a push-button nature. In his testimony as to the similarities between his composition and the picture, plaintiff stated: "Then another striking similarity is the revolving couch, psychiatrist's couch.

There has never been a revolving of a psychiatrist's couch, which goes up and down, because it doesn't make any sense. And I have in my story a revolving cottage, which is built on the cliffs overlooking the ocean. This was conceived by me before—three, four years before I registered the story. It is built on a cliff, and is built on a swivel. By pushing a button you can turn the house in every direction if you wish, facing another scenery. This house revolves in itself, and is built on a pivot and swivel, exactly like the psychiatrist's couch." With respect to the portion of the picture involving the moving couch, writer Betty Comden testified (by means of her deposition) as follows: "Q. In the Gwen Davis story was there a house or office or something like that that had a number of mechanical gadget-type items in it? A. No recollection of that at all. Q. Who wrote in the push-button couch and furniture? A. We don't really know because we weren't here for the shooting. I don't know whose idea it was —Q. Was that in your script originally? A. No. Q. This was something that was subsequently added? A. Yes."

Before turning to evidence relating to the writing of the screenplay by Betty Comden and Adolph Green, reference will be made to testimony bearing upon the issue of similarity. In addition to his own testimony on that issue, plaintiff offered the testimony of three expert witnesses.

One of the expert witnesses was Wallace Harry Woodward, a professional writer. He testified that he was present in the courtroom when the picture entitled "What A Way To Go" was shown and that he had read plaintiff's story entitled "The Three Decker Widow." Portions of his testimony were as follows: "The

basic plot concerns a young woman who marries a series of men who die in each case, leaving her richer and richer and the unusual twist is that she doesn't care about the money. In the case of The Three Decker Widow, Corina doesn't care that the painter is behind in his rent, and she doesn't rent the two apartments that are left vacant by her first and second husbands' deaths, which is a very unusual twist, because there are thousands of stories about women who are golddiggers, but it is very rare that you find a story about a woman who doesn't care about the money at all. I found this to be the same basic plot in the picture What A Way To Go. Besides, the similarities, I noticed that in both cases one of the husbands is a painter, and not only a painter but a mural painter, which is very unusual because when a painter is being used in a story he is usually a portrait painter, someone who just works on an easel; but I noticed in Mr. Desny's story he specifically referred to the painter as a mural painter. And in the picture What A Way To Go, the third painter [*sic*] is also referred to as a mural painter, and he was in the script, which I also saw, the final script for What A Way To Go. . . . In both cases the heroine mentions that she fears she is bewitched, and in both cases the last husband survives and breaks the jinx. So what I noticed was, that although there are many added embellishments to basic plot, the fundamental basic plot remained the same, which is that of a young woman who marries a series of men, and in each case they die, leaving her richer and richer, and that she doesn't care about the money, which struck me as a particularly crucial similarity there."

Turning to evidence relating to the writing of the screenplay, one of the witnesses called by plaintiff was

Arthur P. Jacobs. Mr. Jacobs had been named as a party defendant, but it appears that the summons and complaint were not served upon him. He testified that he was a motion picture producer, the first picture which he produced being "What A Way To Go." The picture was released in May of 1964. His activity relating to the production of that picture began in 1962. He acquired an option with respect to a story identified as "Mrs. Midas or the Midas Touch" from Gwen Davis. At that time the witness had only seen a "treatment"; a screenplay was given to him at a later date. After he had acquired the option, early in 1962 he made an agreement with Adolph Green and Betty Comden concerning the writing of the screenplay to be used in the making of the motion picture.

Mr. Jacobs estimated that Gwen Davis' treatment was about 20 pages in length, but the Comden and Green script from which the picture was made was 124 pages in length. A portion of Mr. Jacobs' testimony was: "A. . . .—the Miss Davis story was the story of a semi-poor girl who lived in a small town, and in her story married a man of her own circumstances, who became fantastically rich and died and left her a lot of money. There were then a succession of four, I believe—I believe four or five husbands. Every time she marries—and she isn't a golddigger, she isn't trying to get money; it just happens everything turns to gold, and everyone of the husbands die in a very strange way. Now, the idea is what appealed to us, to Comden and Green, and I believe we finally, in the screenplay, used the character of which Miss Davis created this lawy, and we used the idea of her continuing to marry and to marry men of relatively average means that become very wealthy, and all die. We used that, but

we did not use the characters other than the first husband. We invented totally different characters, different backgrounds. So we invented the—all the husbands were quite different from the ones indicated in her story, but the idea was used. Obviously, it was based upon her idea, of the lady with all the wealthy husbands. Q. Would you then say that the plot idea was the same? A. Yes."

Mr. Jacobs testified that he went to United Artists and Mirisch Company, who undertook to finance the production of the picture, but they later decided not to go forward with the production. In June of 1963, Mr. Jacobs made the arrangement with Fox for the production of the picture. Mr. Jacobs further testified that he never saw or heard of plaintiff's story until after the present action was filed. The picture had then been completed.

Mr. Jacobs also testified that he owned an interest in the picture.

Gwen Davis (Gwen Davis Mitchell), who was a defendant in the action, was called as a witness by the plaintiff pursuant to the provisions of section 776 of the Evidence Code. She testified that she wrote the screenplay early in 1957, but she had had "the sketch the story, the development and the treatment, for quite a time prior to that." She never read a work by plaintiff called "The Three Decker Widow."

Before proceeding specifically to a consideration of the propriety of the orders respectively granting a new trial and denying the motion for judgment notwithstanding the verdict, attention must be given to Fox's contention that a judgment in its favor is compelled under the reasoning of *Lear, Inc. v. Adkins* (1969)

395 U.S. 653; 23 L.Ed.2d 610, 89 S.Ct. 1902. Fox argues: "This case was tried and went to the jury under Desny's second cause of action which invoked the doctrine of *Desny v. Wilder* [46 Cal.2d 715] which holds that California law will permit the implication of a contract regarding the use of uncopyrightable material, regardless of its lack of novelty, from the circumstances of submission. . . . [¶] Such a cause of action has no viability since June 16, 1969 [footnote omitted], when the United States Supreme Court handed down its decision in *Lear, Inc. v. Adkins*. . . . *Lear* held that an *express written* contract purporting to license an invalid patent would be *unenforceable regardless of California law*, because of the overriding federal policy that ideas be dedicated to the general good unless protected by patent. . . . [¶] *A fortiori* and *implied* contract for such must be unenforceable—or more properly, unimpliable!"

However, the reasoning of *Lear* does not appear to compel the conclusion with respect to the case at bench which Fox deduces therefrom. (See *Donahue v. United Artists Corp.*, 2 Cal.App.3d 794, 808-809.) The reasoning found in section 169.3 of Nimmer on Copyright is persuasive, portions thereof being as follows (pages 734-734.2): "The possibility exists that contractual protection of ideas may be invalidated by the U.S. Supreme Court under the doctrine of federal preemption . . . [A] more recent U.S. Supreme Court opinion, *Lear v. Adkins*, renders this a very real possibility. . . . [The statement by Nimmer of the holding of *Lear* is herein omitted.] This [holding] in itself has little bearing on contractual protection of ideas as here discussed since the very consideration for such a contract, the service of disclosing the idea, assumes that the idea

was not available to the idea recipient but for such disclosure. But *Lear* itself was not the 'typical situation' in that the license agreement in issue had been executed before the licensor's patent had issued, so that for the period until the patent was issued the licensee had the benefit of the inventor's idea only by reason of the licensor's disclosure. This, the Supreme Court stated, 'squarely raises the question whether, and to what extent, the States may protect the owners of *unpatented* inventions who are willing to disclose their ideas to manufacturers only upon payment of royalties.' The U.S. Supreme Court declined to rule on this question as a matter of federal law until the court below, the California Supreme Court, had ruled on the question as a matter of state law. . . . [¶] When this question is ultimately decided, either as a matter of state or federal law, will it mean the overruling of the *Desny* line of cases, and the end of express and implied contract protection for ideas? Such a result would be unjustified not only under the state law of contracts, but also under the rationale which underlies the *Sears* [*Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225] and *Compco* [*Compco Corp. v. Day-Brite Lighting, Inc.* (1964) 376 U.S. 234] doctrine. This rationale is intended to promote the general circulation and public access to ideas. When a contract requires one to pay for an idea which would be available to the contracting party even if he had not so contracted, it is obvious that the state law of contracts in some degree interferes with public access to the idea in question. But if a contracting party gains access to an idea, and is thereby enabled to introduce it to the public, only by reason of his having entered into a contract with the idea discloser, then the state law of

contracts may be said to promote, not diminish, public access to the idea. It is precisely this benefit to the idea recipient, and ultimate to the public at large, that constitutes the consideration which supports a *Desny*-type contract. Unless such contractual protection were available to the idea discloser, many ideas, particularly perhaps in the television and motion picture industries, would remain undisclosed, so that the public's access would be permanently blocked. Furthermore, once the idea is disclosed, albeit subject to contractual rights as against the immediate idea recipient, and the recipient idea does not qualify for copyright protection, the public's right to use of the idea is completely free, subject neither to property nor contractual restrictions. It is, then, the very availability of contractual protection for ideas that ultimately increases the flow of ideas to which the public has access."

Since *Lear* does not proscribe actions of the nature of that presently before this court, the question of the propriety and legal effect of the order granting Fox's motion for a new trial must be resolved. In the notice of intention to move for a new trial it was stated: "Said motion will be made on the ground that the evidence was insufficient to justify the verdict and the verdict was against the law."[2]

Broad powers are exercised by the trial judge in passing on a motion for a new trial. As stated in *Mer-*

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[2]Section 657 of the Code of Civil Procedure is in part as follows:

> "The verdict may be vacated . . . and a new . . . trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following cases, materially affecting the substantial rights of such party: . . . 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law."

cer v. Perez, 68 Cal.2d 104, at page 112: "Such a motion is addressed to the judge's sound discretion; he is vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact; on appeal, all presumptions are in favor of the order as against the verdict, and the reviewing court will not disturb the ruling unless a manifest and unmistakable abuse of discretion is made to appear."

In the performance of her judicial function in passing upon the motion for a new trial upon the record before her, the trial judge was warranted in reaching the conclusion that the credible evidence was insufficient to sustain the inference that an idea submitted by the plaintiff was used by Fox in the production of the picture entitled "What A Way To Go," such conclusion resulting in the conviction on her part that the jury clearly should have reached a different verdict. But it is the position of plaintiff Desny that the order purporting to grant the motion for a new trial was fatally defective in that it did not fully comply with those portions of section 657 of the Code of Civil Procedure which are as follows: "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated. . . . The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons."[2]

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[2]The order granting a new trial was embodied in the minutes of the court of August 29, 1969, as follows: "Defendant's mo-

(This footnote is continued on next page)

In *Scala v. Jerry Witt & Sons, Inc.*, 3 Cal.3d 359, at pages 363-364, the Supreme Court stated: "We explained [in *Mercer v. Perez*, 68 Cal.2d 104] that the requirement of a specification of reasons served the two-fold purpose of encouraging careful deliberation by the trial court before ruling on a motion for new trial, and of making a record sufficiently precise to permit meaningful appellate review. (*Id.* at pp. 112-115.) Applying these principles to the ground before us, we concluded (at pp. 115-116): 'to give full effect to the new scope of review provided in the fourth paragraph of the 1965 amendments, . . . we hold that if the ground relied upon is "insufficiency of the evidence" the judge *must briefly recite the respects in which he finds the evidence to be legally inadequate;* no other construction is consonant with the conclusive presumption on appeal that the order was made "only for the reasons specified." Phrasing the requirement in terms of the codification of the trial judge's power in

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tion for judgment notwithstanding the verdict and motion for new trial are placed on calendar this date and called for hearing. Counsel for the parties present as shown above. The motions stand submitted without argument. The court makes the following decisions. [¶] Motion for judgment notwithstanding the verdict is denied. Motion is granted on motion for new trial on the grounds of insufficiency of the evidence and that the verdict is against the law for the following reasons. [¶] 1. There is no substantial or material similarity between plaintiff's 'The Three Decker Widow' and 'What a Way to Go'. 2. The evidence showld [showed] conclusively that 'What a Way to Go' was developed by third persons from the story 'Mrs. Midas' written by Gwen Davis and from 'I Love Louisa' written by Betty Comden and Adolph Green and that the said story and ideas were conceived, produced and written by these persons completely independently of any story or idea of plaintiff. 3. Defendant Fox did not contribute any idea or story matter for 'What a Way to Go'. 4. Defendant Fox did not copy any idea of plaintiff's. 5. There was no implied contract between plaintiff and defendant, Fox[,] that would justify recovery of any damages for breach of contract."

the second paragraph of the amendments . . ., such an order *must briefly identify the portion of the record* which convinces the judge "that the court or jury clearly should have reached a different verdict or decision." ' (Italics added; fn. omitted.)"

Guidance as to compliance with the provisions of section 657 is found in the following language in *Scala* (3 Cal.3d at page 370): "We are well aware of the many urgent demands on the time of our busy trial courts. We agree, for example, that to comply with section 657 'the trial judge is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses,' nor need he undertake 'a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment.' [Citation.] To avoid overtaxing our already burdened trial courts, it will be sufficient if the judge who grants a new trial furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion to be applicable to the case before him. No hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and circumstances of each case."

While the minute order in the present case (see footnote 3 of this opinion) states that the motion for a new trial "is granted . . . on the grounds of insufficiency of the evidence and that the verdict is against the law," the order must be upheld on the ground of the insufficiency of the evidence to justify the verdict if, with respect to that ground, it sufficiently complies with the governing law as hereinabove set forth. Consequently, consideration in this opinion of the validity of the order insofar as it relates to the matter of the

verdict being "against the law" would serve no purpose.

Turning to the matter of the sufficiency of the statement of the reasons for granting the motion on the ground of the insufficiency of the evidence to justify the verdict, it is manifest that the order must be upheld if there is at least one "reason" stated which complies with the law as expressed in *Scala*. The second "reason" was expressed as follows: "The evidence showld [showed] conclusively that 'What a Way to Go' was developed by third persons from the story 'Mrs. Midas' written by Gwen Davis and from 'I Love Luisa' written by Betty Comden and Adolph Green and that the said story and ideas were conceived, produced and written by these persons completely independently of any story or idea of plaintiff." That reason exhibited the exercise by the trial judge of the duty imposed upon her by law in the determination of the motion for a new trial, informed the plaintiff of the factual aspect of the record which the trial judge found to be insufficient to justify the verdict, and constituted the requisite specification, for the assistance of this court on appellate review, of a factual deficiency upon which the granting of a new trial was based. (See *Mercer v. Perez, supra*, 68 Cal.2d 104, 115-117.) Consequently, the order granting the motion for a new trial must stand.

Turning to the question as to whether the trial court erred in denying Fox's motion for judgment notwithstanding the verdict, the governing law is that which is expressed in *Spillman v. City etc. of San Francisco*, 252 Cal.App.2d 782, at page 786, as follows: ". . . a directed verdict or judgment notwithstanding the verdict may be sustained only when it can be said as a

matter of law that no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that the reviewing court would be compelled to reverse it or the trial court would be required to set it aside as a matter of law. [Citation.] The court is not authorized to determine the weight of the evidence or the credibility of witnesses. [Citation.] Even though a court might be justified in granting a new trial, it would not be justified in directing a verdict or granting judgment notwithstanding the verdict on the same evidence. [Citation.]"

In its opening brief with respect to its appeal, Fox argues that reasons 1, 2 and 5 in the order as to the motion for a new trial (see footnote 3 of this opinion) constituted conclusions of law which compelled the granting of the motion for judgment notwithstanding the verdict. That argument, however, is not persuasive because, has been noted, the criterion governing the trial court in passing upon a motion for a new trial substantially differs from that applicable in the determination of a motion for judgment notwithstanding the verdict. The reasons given do not purport to relate to the latter motion.

In its supplemental opening brief on its appeal, filed after a reporter's transcript had been prepared pursuant to stipulation of the parties, Fox contends that its motion for judgment notwithstanding the verdict should have been granted on either one of two grounds.

The first ground presented is that the uncontradicted evidence established that "What A Way To Go" was independently conceived, written, and developed prior to Fox's involvement in the production of the motion picture and that, accordingly, there was conclusive

proof of independent conception and development which constituted a complete defense to the action. Reliance is placed on the reasoning of *Teich v. General Mills, Inc.,* 170 Cal.App.2d 791, at page 803. It is stated that while Fox contends that no implied contract ever came into existence and that the works in question are not similar, both of those issues became moot once it was established that Fox acquired "What A Way To Go" from an independent developer.

In support of its position that the evidence as to the matter under consideration was uncontradicted, Fox makes reference to certain exhibits and to the testimony of Gwen Davis, Gene Kelly (given by means of his deposition), Arthur P. Jacobs, and Adolph Green (given by means of his deposition). Fox emphasizes by use of italics the following portion of its reference to the record: "Mr. Jacobs testified positively and without contradiction that he and Director Thompson retained creative control over the project and that the content of the film was neither altered nor added to by, or at the behest of, Fox."

The concluding paragraph of Fox's argument is as follows: "In sum, the uncontradicted testimony of Davis, Kelly, Comden, Green, and Jacobs unequivocally demonstrate that WHAT A WAY TO GO was fully conceived, written, and developed prior to the time that Fox entered the scene. Their testimony is internally consistent and entirely uncontradicted and together with the exhibits introduced in evidence conclusively proved that WHAT A WAY TO GO was in all respects produced without reference to, or knowledge of, Mr. Desny's story idea."

In analyzing Fox's contention, it is to be noted that during the period of her testimony Gwen Davis was a

party defendant.[4] The primary witness with respect to the position that "What A Way To Go" was independently conceived by other persons without reference to any story or idea of plaintiff Desny was Mr. Jacobs, who was an interested witness in view of his connection with the picture. The jury, as the trier of fact, was not required to accept unqualifiedly the testimony of either Gwen Davis or Mr. Jacobs. The governing law is stated in *Huth v. Katz*, 30 Cal.2d 605, at page 609, as follows: "In passing on the credibility of witnesses and the weight to be given their testimony, the trier of fact is entitled to consider their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence. [Citations.]" Consequently, the record afforded no legal basis for a directed verdict in favor of Fox on the ground presently under consideration. (See *Blank v. Coffin*, 20 Cal.2d 457, 462.) Section 629 of the Code of Civil Procedure makes provision for a judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made. It is accordingly manifest that the basis for such a judgment in favor of Fox was not present in the case now before this court on the first ground urged by Fox on its appeal.

In view of the fact that Gwen Davis and Mr. Jacobs were manifestly interested witnesses, whose credibility was a matter for resolution by the jury, the determination just stated is not undermined by the reasoning of *Teich v. General Mills, Inc., supra*, 170 Cal.App.2d 791, upon which, as has been noted, Fox

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[4]Gwen Davis was a defendant in the action but the trial court granted her motion for a directed verdict.

places reliance. This is so because the evidence in the present case as to the particular issue is not, in the judgment of this court, of such a kind that it can be characterized as "clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved." (See quotation from *Leonard v. Watsonville Community Hospital*, 47 Cal.2d 509, 515, in *Teich v. General Mills, Inc., supra*, 170 Cal.App.2d 791, at page 799.)

Apropos is the reasoning of this court in *Donahue v. Ziv Television Programs, Inc.*, 245 Cal.App.2d 593, at pages 597-599: "In the main, defendants put on a fairly impressive case to the effect that the idea for 'Sea Hunt' was independently conceived by Tors. On appeal they urge that their evidence to that effect is so strong that the judgment notwithstanding the verdict must be upheld on the authority of *Teich v. General Mills, Inc.*, 170 Cal.App.2d 791 [339 P.2d 627]. . . . [¶] If we could agree with defendants that *Teich v. General Mills, Inc., supra*, 170 Cal.App.2d 791, compels a finding that 'Sea Hunt' was independently conceived by Tors, we could avoid the other issues, but we cannot so agree. In *Teich* the plaintiff submitted a scheme to include a kit for making sun pictures as a premium with defendants' product. Defendant later distributed its product with a very similar kit. After analyzing the evidence concerning the submission the court said: 'We must recognize therefore the existence of an inference of copying and use of plaintiff's idea.' A judgment notwithstanding the verdict was nevertheless affirmed, the court holding that defendant's evi-

dence to the effect that it did not use plaintiff's idea, but a similar one submitted by an advertising agency was ' "clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved. . . ." ' (*Ibid.* p. 799.) (See *Leonard v. Watsonville Community Hospital*, 47 Cal.2d 509, 515 [305 P.2d 36].) [¶] Just where testimony becomes 'clear, positive, uncontradicted and of such a nature that it cannot ratioally be disbelieved' is, of course, a matter of judgment. In *Teich* it appeared to the court that the nature of defendant's testimony, coming in large part from third parties, had the requisite qualities. There was correspondence, stipulated to be genuine, which clearly indicated that General Mills got the idea for the kit from the advertising agency. In the present case the defense is not nearly as compelling. Without in any way intimating our own evaluation of the evidence—we have already indicated that the defense had an impressive case—it simply does not measure up to the quality of the evidence in *Teich*. . . . We are quite satisfied that the judgment cannot be affirmed on the basis that independent conception was conclusively proven."

The second ground upon which Fox contends its motion for judgment notwithstanding the verdict should have been granted is that a comparison of plaintiff's composition with the motion picture demonstrates that there is no substantial or material similarity and, accordingly, plaintiff cannot prevail against Fox in an action for breach of implied contract.

On the issue of similarity the trial court properly permitted plaintiff to offer expert testimony. In *Arnstein v. Porter* (2d Cir. 1946) 154 F.2d 464, at page 468, the court stated: "If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis ('dissection') is relevant, and the testimony of experts may be received to aid the trier of the facts." More recently, in *Scott v. WKJG, Inc.* (7th Cir. 1967) 376 F.2d 467, at page 469, the court stated: "The plaintiff argues that the District Court improperly relied upon the testimony of a paid expert witness for the defense in determining whether there were similarities between the two plays. Expert testimony may be received to assist the trier of fact in an infringement action. Arnstein v. Porter, supra. Therefore, the trial court properly considered that testimony as well as the plaintiff's evidence showing alleged similarities, in reaching its decision." There is no reason why the same rule of evidence should not be applicable in a case of the nature of that presently before this court. Certainly, the analysis of an expert in the field of professional writing should be of assistance to the trier of fact in intelligently resolving the question of the actual existence of the requisite similarity.

A portion of the testimony of one of plaintiff's expert witnesses, Wallace Harry Woodward, has been set forth in an earlier part of this opinion. In the light of the expert testimony it cannot be said that the record did not present an issue of fact for resolution by the jury as to the existence of similarity. Consequently, the second ground upon which Fox bases its position that its motion for judgment notwithstanding the verdict should have been granted is untenable.

The order denying the motion of defendant Twentieth Century-Fox Film Corporation for judgment notwithstanding the verdict is affirmed. The order granting the motion of defendant Twentieth Century-Fox Film Corporation for a new trial is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Ford, *P. J.*

We concur:

Schweitzer, *J.*

Allport, *J.*

APPENDIX B.

Order of the Superior Court Judge Elizabeth Zeigler.

In the Superior Court of the State of California, for the County of Los Angeles.

Victor Desny, Plaintiff vs. Twentieth Century-Fox Film Corporation, Defendant, (Superior Ct. No. 846-594).

Filed: August 29, 1972.

Ludwig H. Gerber, counsel for plaintiff.

Lillick, McHose, Wheat, Adams & Charles, Anthony Liebig and Michael E. Meyer, counsel for defendant.

Defendant's motion for judgment notwithstanding the verdict and motion for new trial are placed on calendar this date and called for hearing. Counsel for the parties present as shown above. The motions stand submitted without argument. The court makes the following decisions:

Motion for judgment notwithstanding the verdict is denied.

Motion is granted on motion for new trial on the grounds of insufficiency of the evidence and that the verdict is against the law for the following reasons:

1. There is no substantial or material similarity between plaintiff's "The Three Decker Widow" and "What a Way to Go".

2. The evidence showed conclusively that "What a Way to Go" was developed by third persons from the story "Mrs. Midas" written by Gwen Davis and from "I love Louise" written by

Betty Comden and Adolph Green and that the said story and ideas were conceived, produced and written by these persons completely independently of any story or idea of plaintiff.

3. Defendant Fox did not contribute any idea or story matter for "What a Way to Go".

4. Defendant Fox did not copy any idea of plaintiff.

5. There was no implied contract between plaintiff and defendant Fox that would justify recovery of any damages for breach of contract.

Supreme Court, U. S.
FILED
MAY 15 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-1334

TWENTIETH CENTURY-FOX FILM CORPORATION,

Petitioner,

vs.

VICTOR DESNY,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1334

TWENTIETH CENTURY-FOX FILM CORPORATION,

Petitioner,

vs.

VICTOR DESNY,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above named Respondent respectfully submits this response to the Petition for a Writ of Certiorari to review the

judgment and the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, entered in the matter of Victor Desny, Plaintiff, vs. Twentieth Century-Fox Film Corporation, Defendant, on January 20, 1972.

The unpublished Opinion of the said Court of Appeal appears in Appendix A of the Petition and the Order of the trial court appears as Appendix B in said Petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C., Section 1257, without further elaboration. The foregoing ignores Rule 19, entitled "Considerations Governing Review on Certiorary, Rules of the Supreme Court", the application of which, Respondent submits, would have been of assistance to this Court

as well as to Respondent in determining what basis Petitioner believes this matter properly before this Court.

The jurisdiction of the Supreme Court to review state judgments is strictly limited to questions depending upon the Constitution, laws or treaties of the United States. A petition for certiorari which fails to show that such a question was necessarily passed upon by the highest state court presents nothing for review by the Supreme Court.

The Supreme Court is not a court of errors and appeals in the same sense as most highest state courts. If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved. (Chief Justice Hughes, S. Rep. No. 711, 75th Cong., 1st Sess., p. 39)

Of course, as pointed out by Mr.

Justice John M. Harlan, the principles governing the exercise of certiorari jurisdiction, which are set forth in Rule 19 of the Court's Revised Rules, while reflecting these fundamental considerations, are subject to many refinements ("Manning the Dikes"; Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States; the 18th Annual Benjamin N. Cardozo Lecture delivered before The Association of the Bar of the City of New York, October 28, 1958).

However, as Mr. Justice Harlan points out, many petitions for certiorari--and the within Petition in particular, Respondent submits--reflect a fundamental misconception as to the role of the Supreme Court in our constitutional system.

It is submitted that Petitioner has presented nothing which should warrant

this Court accepting jurisdiction of the said Petition.

QUESTION PRESENTED

It is submitted that the reason for Petitioner's lack of reference to Rule 19 may be the same quandry as the one which confronts Respondent, to wit: where in the purported "Question Presented" does Petitioner find any application to any portion of the Rule enunciated as a basis governing review on certiorari by this Court?

The within Petition is a virtual invitation by Petitioner to this Court to indulge its time in speculating upon whether, in passing upon the questions involved in Lear vs. Atkins, 395 U.S. 653 (1969), it was sublimably considering that the application of the law of patents as therein involved might be equally applicable to the law of copyrights under a

conjectural state of facts challenging the legal imagination of the Justices of this Court who, Petitioner apparently believes, have ample opportunity and inclination to indulge in such fantasies.

Respondent concedes that such a suggestion borders on the frivolous but in justification submits that the foregoing is, in its practical effect, the extent of Petitioner's suggestion of a "Question Presented".

Nor, is Petitioner's pragmatic reference to the "paramaters of the California Rule" as purportedly set forth in Desny vs. Wilder, 46 Cal 2d 715, 299 P.2d 257 (1956), with nothing more, of any additional assistance in divining a federal question, or any question, justifying this Court's time and consideration.

It is wholly conclusionary on the part of the Petitioner to contend that

the question in Lear vs. Atkins, supra, "posed a closely related question," and it nearly connotes effrontery to represent to this Court that "the California Supreme Court has since refused to consider cases, including this case, which pose the question" without citing to this Court any such cases. Respondent respectfully suggests that such cases properly within the purview of Lear vs. Atkins, supra, are non-existent.

Again, resorting to the words of Mr. Justic e Harlan, a showing that a substantial federal question was necessarily decided by the highest court of the state to which resort could be had is an indispensable requirement of a petition for certiorari addressed to a state court judgment. (28 USC. Section 1257(3))

Such a showing must be precise both as to the existence of a federal question,

which goes to the jurisdiction of the Supreme Court, and as to its substantiality, which bears upon the exercise of the Court's discretion to grant or refuse the writ. Moreover, even if such a question was decided by the state court, it must also appear that its judgment cannot be supported on some acequate independent state ground, for if the judgment may be attributed to such a ground the petition can not be entertained. (See, e.g., Staub vs. City of Baxley, 355 U.S. 313; National Association for the Advancement of Colored People vs. Alabama, 357 U.S. 449)

Secondly, Mr. Justice Harlan suggests that the cornerstone of a petition for certiorari in a federal case is a showing that the question sought to be reviewed is one of general importance. Review by certiorari is "in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants."

(Chief Justice Hughes, S. Rep. No. 711, 75th Cong., 1st Sess., p. 39; see Layne & Bowler Corporation vs. Western Well Works, 261 U.S. 387, 393.)

The fact that a case may have been wrongly decided between the parties, is not, standing alone, enough to assure certiorari. Conversely, of course, the fact that a case may have been rightly decided is not in itself sufficient to preclude certiorari.

Further, adapting the statements of Justice Harlan to the case at issue, the most assured way of satisfying the requirement of Rule 19 that "special and important reasons" for review exist is to show that the issue sought to be reviewed involves a conflict of decisions among the courts below on a point of federal law. In such a case certiorari will usually be granted to resolve the conflict, for

uniformity in the law throughout the federal system is clearly something of prime importance even though a petition for certiorari grounded on a "conflict" must be measured against some important limitations and qualifications surrounding this ground for review.

The differences between the courts below will not be accepted as a conflict if they can fairly be accounted for on the basis of variation in the factual situations among the cases involved. Finally, even where a true conflict may be said to exist certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of the future cases in the courts below, or where the impact of a conflict is narrowly confined and is not apt to have continuing future consequences.

The nub of all these qualifications

is that a conflict of decision may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should promptly be resolved.

Respondent respectfully submits that the latter statements have particular application to this Court's decision in Lear vs. Atkins, 395 U.S. 653 (1969) which, in a sense, is an interlocutory decision plainly contemplating therein that the primary question involved must first be resolved by the California Supreme Court and that it is anticipated that no definitive and decisive action on the part of this Court may be necessary under the facts of that case. Where, then, we may inquire respectfully, lies

evidence of a conflict?

Finally it is respectfully reiterated that Petitioner has presented no question to this Court justifying the exercise of review on certiorari and the Court's attention is respectfully invited to the fact that even Petitioner has candidly refrained from labeling the purported "question presented" as a "federal" question.

CONSTITUTIONAL PROVISIONS AND STATUTES

Once again, Petitioner has left to the conjecture of this Court what significance in connection with its Petition it attributes to the United States Constitution, Article I, Section 8, Clause 8, and the Copyright Law, 17 U.S.C., Section 1, et seq. Presumably, Petitioner desires us all to peruse the cited sections as though renewed familiarity will in some manner

reveal the substance of its cause.

Respondent respectfully submits that it is not his function to discourse upon the copyright law and the provisions of the United States Constitution as an abstract exposition of erudition. On the contrary, Respondent perceives his proper role at this point to respond as succinctly as possible to the propositions advanced by the Petitioner. And, Petitioner having advanced none, Respondent accordingly defers.

STATEMENT OF THE CASE

Petitioner's account of the facts of the case is partially correct. It is notably incorrect when it states that "Respondent Victor Desny, without having been requested or invited to do so, submitted a story outline entitled 'Three Decker Widow' to a motion picture director

under contract to Petitioner Twentieth Century-Fox Film Corporation (Fox) by putting the same in an envelope addressed to the director and leaving it with the secretary in Fox's story department", and that the same was "his unsolicited submission". The inaccuracy relates to the terms "without having been requested to do so" and "unsolicited submission".

On the contrary, the uncontradicted evidence in this regard was that Respondent was, and had been, well known to director Edmund Goulding, who is the director referred to in Fox's statement. The Respondent had appeared as an actor in several of Mr. Goulding's pictures and prior to the occasion referred to above had submitted to Mr. Goulding at least one other story idea, namely, "The Cave", which submission, incidentally, under virtually the identical circumstances

of the presently concerned submission, was duly noted in Fox's story department records. Respondent testified that this relationship resulted in a conversation with Mr. Goulding's secretary, who was also his sister, in which she stated that her brother would like to read Respondent's story and directed Respondent to deliver the story to the story department of the Petitioner "in care of my brother".

Likewise, it is not entirely accurate to recite, as Petitioner does, that Respondent "had no discussions whatsoever with any representative of Fox concerning the story", which was, under the Petitioner's statement of the case, left "with a secretary in Fox's story department" when applying common knowledge of normal human behavior under such circumstances, a presumption arises that some conversation must have taken place. The trial court

and jury had the benefit of Respondent's statement that he stated to the secretary that he was handing her "a story that Mr. Goulding requested. For you to cover it. And, please, will you see that he gets it after that."

The term "cover" had a definite meaning to Fox and to the court and jury. The evidence disclosed that "cover" meant that the story department made a copy or synopsis of every story or story idea submitted to the studio or any of its employees and duly recorded same on index cards. In the interests of complete accuracy, the evidence did not disclose any copy of the said story nor the existence of any index cards concerning same, although the record was complete as to the submission and the covering of the other story submission hereinbefore referred to as "The Cave".

Finally, on the subject of the

statement of the case it would appear presumptious to contend that pages 14-16 of the Appendix A "must be deemed to be California's answer to the question this Cout (sic) posed in Lear Inc. vs. Atkins".

In point of fact, Petitioner has taken great liberty with this Court's decision in Lear Inc. vs. Atkins by attributing to it as "the question this Court posed", the inference that after the discussion of inventions and the Patent Law, this Court intended to imply something to the effect that "Every thing we've said about inventions goes double for story ideas -- and you'd better believe it!" This suggestion, of course, is ridiculous but certainly only something almost analagous would justify Petitioner's implication that the Courts of California are defying the mandates of this Court under the allegations made in the Petition.

LEAR INC. VS. ATKINS PRESENTS NO FEDERAL QUESTION OF SUBSTANCE TO BE DECIDED BY THE CALIFORNIA COURTS UNDER THE FACTS OF THE PETITION

Here again, it is submitted that Petitioner has resorted to generalities which deprive this Respondent of an opportunity to meet head-on any contention that would impliedly support the Petition. We must resort to supposition as to what law is referred to as "California Law" and even more so to identify the "Federal question of substance".

Obviously, Petitioner's quotation from Lear Inc. vs. Atkins, taken out of context, that "Federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent" is inapplicable to stories and story ideas which are protectible, in a general sense, not by patent

but by copyright. Nowhere in the Petition is an analogy set forth between the provisions of the patent law and those of the copyright law which Petitioner could claim provides a bridge over which Lear Inc. vs. Atkins could pass in authority from one to the other. Again, we must surmise that Petitioner intends its representations shall stand as authority without delineation of the portions of the two laws which it believes to be persuasive in support of its claim.

In fact, the whole presentation to this Court, as well as to the Courts of California, by Petitioner is based upon an interpretation by Petitioner of the import of the case of Lear Inc. vs. Atkins, 395 US 653.

It is very evident that there are, at least, two contradicting theories, each of which is said to be grounded in Lear

Inc. vs. Atkins, one presented by "Nimmer on Copyrights" adopted by the Opinion of the Court of Appeal (Petitioner's Appendix A pp. 14-16) and the other advanced by Petitioner.

If we subscribe to the interpretation of the opinion of the United States Supreme Court in Lear Inc. vs. Atkins advanced by Professor Nimmer, in his book "Nimmer on Copyrights," pages 734-734.2 (Petitioner's Appendix A p. 14 et seq.), we are constrained to believe that the California law, both as to statute and decision, achieves the end sought by the United States Supreme Court. That is to say, Professor Nimmer opines that it is the intent of that court that the public shall not be denied the benefits and access to new ideas under a theory of an implied contract arising in one claiming to be an originator of said idea. Seemingly, it

is Professor Nimmer's reasoning that the State of California law and observance of a theory of implied contract has exactly the effect desired by the United States Supreme Court, to wit, that in its operation many ideas which might otherwise not come to public attention and inferentially public benefit, are thereby encouraged and do come into the public access. (Petitioner's Appendix A p. 16)

It is submitted that under this reasoning there is no vital necessity for the Supreme Court of California to do other than perhaps to affirm Professor Nimmer's theory in order to meet any mandate which may be inferred in the United States Supreme Court decision in Lear Inc vs. Atkins, supra.

However, on the other hand, are we to subscribe to the position of Petitioner, which incidentally is advanced without any

support in so far as Petitioner suggests any benefit to the public in general, by reading into Lear Inc. vs. Atkins a pronouncement which will destroy the holdings of Desny vs. Wilder, 46 Cal 2d 715, and the cases stemming from this decision? In other words, the Petitioner would have the Supreme Court of the State of California read from the decision of the United States Supreme Court, an absolute and positive admonition that the efficacy and the equity of Desny vs. Wilder, supra, and the cases stemming therefrom, be swept out of California law and that, unless the literary property was copyrighted, there can be no protection whatsoever to an originator of uncopyrighted literary property and that literary products of the mind, if uncopyrighted cannot, as a positive fact, be the subject of an express or implied contract between the parties to the effect that if

used by the "idea recipient", the originating party will be compensated.

The aforegoing seems a harsh and almost absurd contention to be urged upon this Court but, it is respectfully submitted, these very terms are specifically set forth in the Petition.

It is respectfully submitted that this Petitioner is not entirely altruistic in its proposal to this Court. It is indeed most materially interested in forever putting away the theory of implied contracts set forth in Desny vs. Wilder and for a very obvious reason. It is in a business which may be organized and equipped with millions of dollars worth of electronic apparatus, have in its employ dozens of talented and capable actors and actresses, as well as all of the necessary supporting personnel, but which, despite all of this, cannot produce its product without

the product of someone else's mind. That is to say, without the literary property, the plot, the story, and the screenplay, the millions upon millions of dollars invested in the film industry are helpless and wasted. It must be a constant source of irritation to Petitioner and its fellow members of the film industry that in the final analysis they must still be at the mercy of a writer or creator or a literary property.

Let us not be misled by the impression that authors have but to copyright their material, which is admittedly a relatively simple process as compared with the laborious and intricate proceedings leading hopefully to the patenting of an invention, to protect their literary property. As simple and ministerial a proceeding as registering under the Copyright Act is, the Act does have its limitations

in that "story ideas" and "plot ideas", as defined in the present proceedings, are not under definition, copyrightable, since it is the writings of authors which are protectible and the fact that a list of words is in writing or on a sheet of disjointed phrases or sentences, does not entitle the same to protection.

Yet Petitioner traffics in "story ideas" and "plot ideas" ... "if they are on paper" (Rep Tr p. 257, lines 19-21) and even though they may be "as short as one paragraph or one page." (Rep Tr p. 276, lines 7-9) It is submitted that it is of no particular significance that at the latter point in the testimony the reference was to "stories" since it is obvious from the context of the testimony that "story ideas", "plot ideas" and "stories" were, in the minds and intentions of the witness and examiners, synonymous.

The material submitted need not be novel or original, because recovery is being sought on the basis of contractual agreement, not on the ground that property rights under California Civil Code, Section 980 are being invaded. Therefore, while questions of originality and novelty may be pertinent where property rights are asserted, such considerations are clearly out of place here. Studios frequently purchase non-novel ideas, and such ideas have formed the basis of many successful motion pictures. (Kurlan v. Columbia Broadcasting System, 40 Cal 2d 799, 810, 256 P. 2d 962, 970 (1953).)

The audacity of Petitioner in castigating the California courts for failing and refusing "to acknowledge either the implications or the supremacy of Sears, Compco and Lear in the implied submission agreement context," measured by Petitioner's

monsterous statement that the aforecited cases "signalled a fundamental change in the law of ideas by emphasizing the primacy of the principle that ideas not protected by patent or copyright are available to all," disregarding in each instance that this Court has included the phrase in qualification, "ideas in general circulation," is to strip Petitioner of all pretension of equity and good conscience and expose to this Court the true basis of Petitioner's position and the callous and decadent juristic depths to which it apparently believes the United States Supreme Court, and inferentially, the whole system of American justice, has succumbed.

To assert that the facts of this case exemplify conduct on the part of Petitioner and its ilk, which is exonerated -- nay, exalted -- by the decision in Lear Inc. vs. Atkins is to claim that the United States

Supreme Court has given Petitioner a license to steal, which Petitioner has the temerity to ask this Court to ratify.

Truly, this is an ideal case to demonstrate the immunities Petitioner believes itself cloaked with and the practical effect and application of Lear Inc. vs. Atkins, according to the gospel of its counsel.

The basic paupacity of Petitioner's position is never more evident than in the dying gasps of its Petition when it decries a fancied "rule of law which permits a jury to find an implied contract requiring payment for the use of common uncopyrighted ideas where there have been no writings, words, meaningful conduct or mutual intent". Petitioner certainly cannot be referring to any such rule of law prevailing in California as every one of the Petitioner's numerous references

to California cases will attest; in every instance where relief was granted there was either writings, words, meaningful conduct, or mutual intent found.

Lastly, no "publishers, broadcasters, and entertainment producers" have ever been forced "to pay tribute for using the commonest ideas" unless it has been proved that the said ideas were first unilaterally denominated "common" by the idea recipients after the latter had come into full possession of the idea under circumstances found by the court to amount to a promise to pay for the same. Surely Petitioner cannot expect this Court to sanctify a relapse into a legal wilderness where might will make right and the intellectual creator will be forced singlehandedly into unequal joust with rapacious legions whose greed and avarice recognize neither law nor equity.

CONCLUSION

Respondent respectfully submits that law and equity with respect to protection of literary property have been well served by the Courts of California, both in the interest of the writer and the idea recipient, and with full cognizance of the copyright law and the rules of contract.

A Petition for review on certiorari which reveals no fruitful grounds for this Court's examination should be denied.

Respectfully submitted,

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